UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

v. S2 04 Cr. 1002(CLB)

TRIAL

RICHARD JOSEPHBERG,

Defendant.

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White Plains, N.Y.
April 18, 2007
9:15 a.m.

Before:

THE HONORABLE CHARLES L. BRIEANT,

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
STANLEY J. OKULA, JR.
Assistant United States Attorney
-- and --
Department of Justice Tax Division
ANDREW J. KAMEROS
Trial Attorney

JARED J. SCHARF
ADAM SCHARF
Attorneys for Defendant

APPEARANCES (Continued)

RICONDA & GARNETT
Attorneys for Defendant
MICHAEL T. SULLIVAN

Also Present:

TIMOTHY RYAN, Internal Revenue Service
JOHN DENNEHY, Internal Revenue Service
SUSAN GIORDANO, Paralegal, United State's Attorney's Office
WILLIAM DAVIDSON, Investigator for Defendant

of the indexes and that each has seen the other's.

(In open court; jury present)

THE DEPUTY CLERK: The Court is about to charge the jury. Anyone wishing to leave, please do so quietly.

THE COURT: Members of the jury, I appreciate the patience and thoughtfulness with which you performed and attended to your duties at this trial, and now you're going to be performing your final function as jurors, acting as ministers of justice, one of the most significant obligations of American citizenship.

You should each discharge your final duty in an atmosphere of complete fairness and impartiality and, as I mentioned when you were first selected, without bias or prejudice for or against the government or the defendant, who are parties to this controversy.

As I've told you in the beginning of the trial, under our court system, the function of the judge and of the jury are separate.

You are to decide and pass upon the disputed fact issues in the case. You are the sole and exclusive judges of the facts. That's so important that you may hear me repeat it more than once. You should determine the facts from what you believe to be the believable or credible evidence. You should also decide the weight and significance of the evidence, both the testimony and the exhibits. You evaluate and decide the

credibility and truthfulness of the witnesses, and you draw the conclusions which are reasonable inferences from the evidence, and you resolve in your deliberations any conflicts there may be in the evidence.

My task now is to instruct you as to the applicable law and explain it to you. And it's your duty under your oath as jurors to accept the Court's instructions as to the law and apply them to the facts as you find them to be, and, on that basis, you will decide the case.

The fact that the government is a party to the case entitles it to no greater consideration than that given to any other party in a court of law. Both sides of any case, individuals and the government alike, stand as equals before the court and jury.

Neither the indictment nor the fact that an indictment has been issued is any evidence whatsoever of the crimes charged. Instead, an indictment is merely the method or procedure under the law whereby the person that is accused of a crime is brought into a court to have his case determined by trial jurors such as yourselves. An indictment is not considered except for its purpose of defining the charges against the defendant, and, therefore, not the fact that an indictment has been issued nor the indictment itself must be given any evidentiary weight whatsoever. It's merely a document containing accusations.

The defendant is on trial only for the acts or conduct alleged in the indictment. The defendant is not on trial for any charge not mentioned in the indictment.

The defendant has pleaded not guilty to each of the 17 counts of the indictment, and the government has the burden of proving each element of each count beyond a reasonable doubt. And if the government has failed to prove any single element of a count in the indictment which you are then considering beyond a reasonable doubt, you must return a verdict for not guilty on that count and go on and consider the next count. If, on the other hand, you find that the government's proved every element of the count you are then considering beyond a reasonable doubt, you should convict on that count.

I'll define and explain the elements of the different counts as we proceed. You can treat them as if they were separate cases being tried together. If you find guilt on one count, that doesn't necessarily mean that the defendant is guilty on any other count. Each one is like a separate trial.

The defendant is never required to prove his innocence. And as I told you before, the defendant is presumed innocent of the accusations contained in the indictment. The presumption of innocence is one of the strongest presumptions known to the law, and it's in the defendant's favor at the start of the trial, it continues in his favor throughout the entire trial, it's in the defendant's favor now, and it remains

in his favor during the course of your deliberations in the jury room. And the presumption of innocence is removed only if and when you, the jury, are unanimously satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt on the count you are then considering. The presumption applies to each count in the indictment.

Now, the question naturally arises, what's a reasonable doubt? Well, members of the jury, those words almost define themselves. A reasonable doubt is a doubt based upon reason, upon common sense. It's the kind of doubt that would make a reasonable person such as yourself hesitate in connection with an important matter in your own life.

It's not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. And a reasonable doubt is not based on mere speculation.

The burden of proof beyond a reasonable doubt is placed at all times on the government and never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of offering any evidence or proving his innocence.

If, after a fair and impartial consideration of all the evidence, you have a reasonable doubt as to the defendant's guilt on the count you're then considering, it's your duty to

find a verdict of not guilty as to that count. On the other hand, if, after a fair and impartial consideration of all the evidence, you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote a verdict of guilty on that count.

The evidence in the case consists of sworn testimony of all the witnesses and all the exhibits admitted into evidence, including stipulations of fact. If I make any reference to any factual matter or testimony which doesn't agree with your recollection, that controls. Anything said about the evidence or the facts by the Court or by the lawyers in their closing arguments or during the trial doesn't take the place of your own recollection or understanding of what the evidence is.

As I told you earlier, opening and closing statements by the attorneys are not evidence. They're only an indication of what the attorneys expected to believe that -- expected to show you and believe they have shown you in the course of the trial, and it's only permitted to help you in understanding the evidence.

Questions are not evidence. Questions are never evidence. The evidence is in the answers. The questions are useful only to the extent that they help you to understand the meaning and significance of the answers.

Please understand that this trial is not a fight

between the attorneys and it's not a dispute between any attorney and the Court. It's a search for truth and justice.

Please do not infer from anything said by me that I have any opinion as to the case. I do not. That's not my job. It's your job. I leave it entirely with you.

The documents and exhibits received in evidence are evidence. Anything as to which an objection was sustained by the Court or ordered to be stricken out must be disregarded by you in its entirety, and you must follow the Court's rulings on those matters.

In your work as jurors, you're asked to draw inferences from pieces of evidence before you and from testimony and exhibits. Inference is simply a word which describes a process of reasoning whereby you start with a fact or facts known to you or already proved and you conclude from that another fact which, in logic, flows from the facts known to you.

A decision of whether or not to accept or reject a disputed inference lies entirely in your sound judgment as jurors.

Evidence which requires an inference to be drawn by the jury is what's commonly called circumstantial evidence. There is no distinction in this court between direct evidence and circumstantial evidence. The totality of all the evidence must indicate that the defendant is guilty beyond a reasonable

doubt on the count you're then considering, and if you do not so find, you must return a verdict of not guilty on that count.

Some of the exhibits in this case are charts and summaries. And as I mentioned at the time these were received in evidence, a chart or a summary is merely an analysis or summary of documents previously admitted or certain testimony previously heard and, in some instances, to set forth in detail conclusions and calculations that a witness summarized orally.

These charts and summaries are offered to assist you as visual or organizational aids. They are not themselves, however, evidence. They're merely graphic demonstrations of underlying testimony in evidence and documents and so forth. It's the underlying evidence and exhibits which determines what weight, if any, these charts and summaries deserve. By placing something on a chart, you don't give it any greater weight or significance than the underlying exhibit or exhibits show.

So it's for you to decide whether the underlying evidence is entitled to weight and, if so, to what extent. And you're entitled to consider the charts and summaries if you find they assist you in analyzing and understanding the evidence from which they were prepared, but, by themselves, they add nothing to the case.

As I think I have told you before, you are the sole judges of the credibility or truthfulness of any witness. And you and you alone, after discussing with each other, determine

the weight and significance that each witness' testimony deserves.

You should consider the testimony the witness gives as well as all the evidence in the case which tends to tell you whether the matter in the testimony is worthy of belief. And here again, you use your common sense as jurors. You may consider the witness' intelligence, motive and demeanor; that is to say the manner in which he or she gives testimony on the stand. You may consider the opportunity the witness had to observe or remember the facts concerning the testimony as well as the plausibility or improbability or probability of the testimony in light of all the other facts in the case. You may also consider any relationship which the witness has to either side of the case or the manner in which any witness may be affected by or interested in the outcome of the trial.

If testimony is unreasonable on its face or inconsistent with other evidence or testimony which you do believe, you may reject that evidence. Now, there's no magic formula to evaluate the truthfulness of a witness. In your everyday affairs, each of you determines for yourself the reliability of statements made to you by other people, and those same tests that you use in your everyday dealings should be applied to your jury deliberations. You use your common sense. You rely on your human experience.

You're instructed, members of the jury, that sworn

testimony in a prior proceeding or trial or deposition has the same sanctity as sworn testimony under oath given at trial right here in the courtroom, and it is permissible to confront a witness with prior inconsistent testimony which he or she may have given in another trial or proceeding. You may consider that in weighing the credibility of the witness, and, in fairness, you should consider any explanation which the witness may give for any such inconsistency.

I wanted to mention the issue of so-called expert witness testimony. Ordinarily a witness is not permitted to testify as to opinions, but only as to facts. However, there's an exception for this, and the law permits the opinions of qualified experts on technical matters to be received into evidence. And this so-called expert may testify as to his or her opinion on a subject about which he or she has specialized knowledge or education. And this testimony is permitted on the theory that information from a person having special or technical experience may assist you in determining the facts of the case.

In weighing expert opinion testimony, you may consider the expert's qualifications and the opinion and his or her reasons given for the opinion, and you may give that testimony such weight and significance as you feel it deserves. You can accept his or her opinion or reject it in whole or in part as you believe proper. And the determination of the facts in the

case rests solely with the jury, and that applies to the testimony of persons having expert information in any particular field.

The defendant did not testify in this trial, and you are instructed that, under our Constitution, a defendant has no obligation to testify or to present any evidence because, as I explained earlier, it's the government's burden at all times to prove the defendant guilty beyond a reasonable doubt of the count in the indictment you're then considering. And that burden remains with the government throughout the entire trial, and it never shifts to a defendant, and a defendant is never required to prove he's innocent.

You may not attach any significance to the fact that the defendant did not testify. You may not draw any adverse inference against him because he didn't take the witness stand. Indeed, you may not discuss or consider this in any way during your deliberations in the jury room.

You're instructed that the testimony of an alleged accomplice, such as Hyman Fox, someone who has said he participated in the commission of certain of the crimes charged in this case, must be examined and weighed by the jury with great care.

The fact that an alleged accomplice has entered into a plea of guilty to the offense charged is not evidence of the guilt of any other person, including the defendant. I want to

emphasize that point particularly.

There was some discussion yesterday that some of the other people involved in some of the Cralin Enterprises may have entered pleas of guilty. That has no probative value in this case. Guilt is personal, and whether they chose to enter pleas of guilty or not has no bearing on the guilt of this defendant. That's to be determined solely from the evidence in the case of this trial.

With respect to the accomplice, the jury must determine whether the testimony of the accomplice has been affected by self-interest or by the agreement he has with the government or by his own interest in the outcome of his case or by prejudice or bias against this defendant.

In evaluating the credibility of a witness testifying under a cooperation agreement with the government, you should ask yourselves whether the witness would benefit more by lying or more by telling the truth. Was his testimony falsified in any way because he believed or hoped that he would somehow benefit by testifying falsely? Or did he believe that his interests would be best served by testifying truthfully? If you believe that the witness was so motivated, was the motivation one which would cause him to lie or was it one which would cause him to tell the truth?

The government argues, as it is permitted to do, that it must take its witnesses where it finds them and must, at

times, use the testimony of an accomplice because it would be otherwise impossible or difficult to detect and prosecute wrongdoers.

As with every other witness, you should consider all the facts in the evidence, including the witness' demeanor, strength of his recollection, his background, and the extent to which his testimony is or is not corroborated by other evidence in the case. And just as you can with any other witness in the trial, you can accept parts and reject parts of his testimony as you perform your duty to judge his credibility and reliability.

You may not draw any inference, favorable or unfavorable, towards the government or the defendant from the fact that any person other than the defendant was not named as a defendant in this particular indictment submitted for your verdict or is not on trial before you in this case. You may not speculate as to the reasons why other persons are not on trial here. That's a matter wholly outside your concern and has no bearing on your function as jurors in deciding this case.

I'm now going to explain the law with respect to the charges in the indictment. And as I mentioned to you earlier, the indictment is merely a charge or accusation. There are, as you've heard already, 17 separate counts. Each one must be considered separately. And as I told you earlier, and I want

to emphasize it, Mr. Josephberg is not on trial for anything that's not contained in the indictment.

Count One charges Mr. Richard Josephberg with attempting to evade the payment of income tax he owed to the Internal Revenue Service for the years 1977 through 1980 and 1983 through 1985 inclusive.

Count Two charges Mr. Josephberg with conspiring or entering into an illegal agreement or understanding to act together with at least one other person for several criminal purposes; one, to defraud the United States and the Internal Revenue Service; two, to violate federal statutes making it a crime to attempt to evade federal income taxes and file false federal tax returns; and, three, to commit healthcare fraud by scheming to defraud a healthcare benefit program known as the Oxford Health Plans. And they may be referred to as OHP from time to time, but that's a business name of Oxford.

Counts Three and Four charge the defendant with attempting to evade a substantial part of the income and employment taxes he owed for the tax years 1997 and 1998.

Counts Five and Six charge Mr. Richard Josephberg with signing false individual income tax returns for the tax years 1997 and 1998.

Counts Seven through Ten charge the defendant with failing to file in a timely fashion his 1999 through 2002 individual tax returns. Each count pertains to a different

year.

Counts Eleven through Fifteen charge Mr. Richard Josephberg with failing to pay the individual income taxes that he owed for the years 1999 to 2003. Each count is for a separate year.

Count Sixteen charges him with corruptly endeavoring to impair and impede the due administration of the Internal Revenue laws by engaging in the conduct alleged in Counts One through Four and Seven through Ten.

And Count Seventeen charges him with attempting to defraud the healthcare benefit program of Oxford Health Plans by means of false and fraudulent pretenses.

That's a summary of what the different counts are.

All of the charges in the indictment, with the exception of Count Seventeen, involve tax crimes.

The internal Revenue Code is a statute passed by Congress. Because this is a self-governing country, the jury is required to accept the Internal Revenue Code as it presently stands even if you think that some of its provisions are too complicated or unfair.

Under the Code, taxpayers are required to complete and file honest returns, sign them under penalty of perjury, and pay the tax as shown thereon. And Congress has created criminal statutes to impose criminal penalties to assure compliance with the Code.

You're instructed that the filing of federal income taxes is not voluntary. Individuals who have received income in excess of the minimum amount for that year, as specified in the Internal Revenue Code, are required to file federal income tax returns where required by law and to pay the taxes imposed.

I further instruct you that the pressure of other financial obligations is no defense to your obligations and liabilities under the Internal Revenue Code as adopted by Congress.

I want to say something preliminary about what this trial is not about. This trial has nothing to do with the actual collection of any taxes that may be due to the government. This is a criminal trial, and the object of the trial is to secure the enforcement of laws passed by Congress which establish a federal crime to attempt to knowingly and willfully defeat or evade the payment of taxes due or to fail to sign returns or to fail to file honest returns and for other charges as I have mentioned earlier and will mention later.

There's a distinction between civil liability imposed upon a defendant for the nonpayment of a tax and criminal responsibility for unlawful acts or conduct in violation of the Internal Revenue Code. And you are not concerned here with civil liability; that is, whether or not taxes claimed to be due have been paid or will be paid. Rather, the issue here is whether the government has proved beyond a reasonable doubt

that the defendant knowingly and willfully committed the crimes charged in the various counts in the indictment. This is not a collection case.

Count Two in the indictment is a conspiracy count. The other counts are referred to by lawyers as substantive counts. And unlike the conspiracy charge, which is a charge of agreeing together with one other person, at least one other person, to commit one or more crimes, the substantive counts are based on actual commission or attempted commission of the offenses referred to as the objects of the conspiracy.

A conspiracy to commit a crime is an entirely separate and different offense from the underlying substantive crime which may be the object of the conspiracy. The essence of the crime of conspiracy is an agreement or understanding by two or more people to violate other laws or to defraud the United States followed by commission by a member of the conspiracy of an overt act. And I'll talk about overt acts in a moment. Overt means open.

If a conspiracy exists, even if it fails in accomplishing its object, it is still punishable as a crime. So, in a conspiracy charge, there is no need to prove that the crime or crimes which were the objective of the conspiracy were actually committed. By contrast, the substantive counts require proof that the crime charged was actually committed, but do not require proof of an agreement, nor is a

co-participant necessary in order to convict on a substantive crime.

Of course, if a defendant both participates in a conspiracy and commits the crime or crimes which were the object of the conspiracy, then the defendant would be guilty of both the conspiracy and the substantive charge, each being separate counts, as I'll explain to you shortly.

A crime has certain elements, and the elements each of which must be proved beyond a reasonable doubt are different for the different counts. And I'll come to that in a moment.

Count One charges the defendant, Mr. Richard Josephberg, with knowingly and willfully attempting to evade the payment of income taxes that were assessed and due and owing for the calendar years 1977 through 1998 by him and 1983 through 1985. In simple terms, Count One charges the defendant with attempting to evade payment of taxes that had previously been determined and assessed by the Internal Revenue Service to be due.

Counts Three and Four charge him with attempting to evade the assessment or proper determination of income taxes due and owing for the calendar years 1997 and 1998.

Counts Three and Four -- Counts One, Three and Four all charge the violation of the same federal statute, Section 7201 of Title 26 of the United States Code. You don't have to remember the numbers, but you have to understand what the

statute requires. And that reads, in pertinent part:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by law shall be guilty of the offense of tax evasion."

That concludes a reading of the statute.

When I discuss, as I will now do, the elements of these tax evasion charges, you should consider them not just in relation to Counts One, Three and Four, but also in relation to Count Two, because Count Two charges a conspiracy to accomplish four different objects, one of which is to attempt to evade Mr. Josephberg's income taxes. So you are required to consider my instructions on the substantive crimes when you consider the objects of the conspiracy charge.

In order for the crime of tax evasion and violation of the statute just read to you to be proved, the government must establish beyond a reasonable doubt each of the following three elements. If any single element cannot be established as to a particular count you're then considering beyond a reasonable doubt, you must find a verdict of not guilty on that count and go on to the next count until you've covered them all. These are the elements of the evasion counts:

First, that the taxpayer had substantial tax due and owing;

Second, that the defendant committed an affirmative act constituting an evasion or an attempt to evade the tax or

tax due as described in the indictment; and,

Third, that he acted willfully in attempting to evade the underlying tax debt with respect to Count One or the assessment of tax with respect to Counts Three and Four.

For each of the tax evasion counts which correspond to years 1977 through 1980 and 1983 to 1985 for Count One and 1997 and 1998 for Counts Three and Four, you must decide whether or not the government has proved these three elements beyond a reasonable doubt. And each count and, therefore, each year, has to be considered separately.

The first element of the offense is that the defendant owed a substantial amount of federal income tax for the tax year or years you're considering for the count that you're presently considering. And with regard to Count One, the government contends that Mr. Richard Josephberg owed additional taxes for the years 1997 to 1980 inclusive and 1983 to 1985 inclusive as a result of assessments made by the IRS based on the disallowance of certain partnership losses claimed on the income tax returns that he filed for those years.

You are instructed that assessments by the IRS constitute prima facie -- that's a Latin word which means on its face -- constitute sufficient evidence of the asserted tax deficiencies. You may, however, consider whether there is evidence from which it can be concluded that the IRS improperly or incorrectly assessed the taxes in determining whether

Mr. Richard Josephberg owed additional taxes for any of those years. And you must consider all the evidence in the case and consider and decide whether the government has proved beyond a reasonable doubt that Mr. Josephberg owed substantial additional income tax for the tax year or years that you're then considering.

As I mentioned earlier, the government does not have to prove the precise amount owed so long as it proves beyond a reasonable doubt that it is substantial for the count of the indictment you are then considering.

It is for you to decide whether a substantial tax deficiency exists for the years in issue, and in making that decision, you should consider all the evidence in the case.

With respect to Count One, the government does not have to prove the exact amount of the taxes that he owed from 1977 through 1980 and for 1983 through 1985. And the government does not have to prove that he attempted to evade or defeat payment of all the taxes for those time periods. Instead, the government need only prove that the amount owed from any one of those years was substantial and that he attempted knowingly and willfully to evade or defeat all or part -- all or a substantial part of it.

Whether the amount of the tax due is substantial is an issue for you to decide. Substantiality is not measured in terms of gross or net income or by any particular percentage of

the tax shown to be due and payable. All of the attendant circumstances must be taken into consideration. You should decide, based on all relevant factors, whether the tax owed, if any, was substantial or merely trivial.

With regard to Counts Three and Four, the government contends that the additional taxes due and owing for the years 1997 and 1998 arose from Richard Josephberg's filing of federal income tax returns for those years that claimed false net operating losses from a prior period which served to reduce the tax liability for those years as shown on the return and, also, and separately from the net operating loss issue, it failed to report -- the return failed to report the wages paid to a domestic employee and the tax due thereon.

The government may prove either or both of those, but you cannot convict on any of those counts unless you're in agreement as to which issue was involved.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that there was a tax due for the year or group of years at issue, then this element has been satisfied.

It is not enough, as I said earlier, that some of you believe that he had substantial taxes due and owing based on false claims of net operating loss, or NOL, as it's been called, and some don't and some of you believe that there was substantial tax due and owing based on unpaid employment taxes.

You must all be unanimous as to at least one of the two alleged bases for substantial tax due and owing in order to find the defendant guilty on these particular counts.

You're instructed that the federal tax law provides that individual taxpayers may not claim losses from investments in partnerships unless such investments are made with a genuine economic profit motive. This profit objective requires that taxpayers like those who entered into some of these straddle and government securities, repo transactions, enter into the transaction primarily for profit. If you have a profit motive, then the losses you incur can be deductible even if there's no profit. But if there's no profit motive, then losses from the transactions may not be properly deducted because such losses lack economic substance. A transaction lacks economic substance if it cannot with reason be said to have a purpose or substance or utility apart from the anticipated tax consequences or tax benefits.

You're also instructed that income is taxable to the person who earns it, and the person earning the income cannot avoid taxation by entering into an arrangement whereby that income is diverted or assigned or placed in the name of some other person, such as a child of the taxpayer.

Now, such assignments known to tax lawyers as anticipatory assignments of income are not recognized as a means of avoiding tax liability. A person who is firmly

entitled to receive income, who makes an anticipatory gift of it, is taxable just as if that person had received it and later given it away. It's not illegal to give it away, but it doesn't change the tax consequences. And there are no relevant exceptions to the assignment of income doctrine.

Federal tax law also provides that property that is transferred to a person as compensation for services, such as stock, must be included in gross income of the person who performed the services in the first year that the property is transferred. When shares of stock are issued as compensation for services rendered, stock is valued on the date the shares are issued irrespective of any restrictions stamped on the stock certificate which lapse in the future. The value of restricted stock issued as compensation is determined by looking at the fair market value of that stock on the date of issuance irrespective of the restrictions, and that value is taxable income in the year in which the stock was received.

The phrase to attempt to evade or defeat an income tax involves two things. First, the formation of an intent to evade or defeat a tax or the payment thereof and, secondly, thereafter willfully performing some act to accomplish the purpose or intent to evade or defeat that tax.

The indictment charges in Count One that the defendant knew and understood that for the calendar years 1977 to 1980 and 1983 to 1985, he owed substantial federal income tax and

then tried in some way to evade the payment of that tax. The indictment further charges in Counts Three and Four that, with respect to his tax obligations for the years 1997 and '98 respectively, he knew he owed substantial federal income tax and then tried in some way to evade or conceal from the Internal Revenue Service the amount of tax owed.

Therefore, in order to show an attempt to evade or defeat a tax or the payment thereof, the government must prove beyond a reasonable doubt that the defendant, Richard Josephberg, intended to evade or defeat the tax due or payment thereof and that he also committed some act designed to conceal or misrepresent his income or his assets from the Internal Revenue Service.

Any intentional conduct, the likely effect of which would be to mislead or conceal for tax evasion purposes, is sufficient to establish an affirmative act of attempting to evade or defeat income taxes. The only requirement is that the defendant must take some affirmative action with that purpose in mind.

Conduct that constitutes or is sufficient to establish an affirmative attempt to evade a tax or payment thereof includes the use of bank accounts in the names of others; transferring income or money or property in an attempt to conceal ownership; causing debts to be paid through and in the name of others; use of corporate entities to pay personal

bills; making ownership of companies appear falsely in the names of others; making of false statements to the IRS; filing of false tax returns; or any other conduct, the likely effect of which would be to mislead or conceal, including directing others to do any of the things that I've just mentioned.

Although the government must prove that the defendant committed some affirmative act constituting an attempt to evade, it need not prove each act alleged in the indictment. The proof of one affirmative act is enough.

With regard to Count One, the government must prove that he took some affirmative step during the period from 1995 through the date of the indictment with the intention of hiding or concealing income or assets from the Internal Revenue Service which was seeking to collect the taxes due for the years '77 to 1980 and '83 to '85.

With regard to Counts Three and Four, the government must prove that Mr. Richard Josephberg took some affirmative step during the year charged or in connection with the filing of the return for the year at issue, such as filing a tax return understating his tax liability through the inclusion of a net operating loss deduction that he knew was not valid, to conceal his true tax liability for that year from the Internal Revenue Service.

Where more than one particular affirmative act of evasion is charged, you must be unanimous as to at least one of

the acts before you may give a unanimous verdict and before you can conclude beyond a reasonable doubt that the government met its burden to prove that element. It would not be sufficient if some of you agree on one alleged affirmative act of evasion and the rest of you don't agree on that one, but you agree on some other affirmative act. That would not be unanimous, and you would have to continue discussion, because it must be unanimous as to what the affirmative act of evasion is before a verdict of guilty could be found, and if you don't so agree, your obligation is to find the defendant not guilty.

The third element of these charges which the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully. Those are important words. They recur in connection with other counts. And in connection with these counts, the government must prove beyond a reasonable doubt that the defendant knew that he owed substantially more federal income tax for the calendar years 1997 and '98 than was declared on his tax returns for those years and owed substantial taxes that had been assessed by the IRS for the years 1977 to 1980 and 1983 to 1985. Whether he had this knowledge is an issue of fact to be determined on the basis of all the evidence.

An act is done knowingly only if it's done purposely and deliberately and not because of mistake, accident, negligence or some other innocent reason.

In this regard, I instruct you that the Internal Revenue Code provides that the fact that an individual's name is signed to a return is evidence that the return was actually signed by him. That appears not to be disputed in this particular case. If you find that he signed the return, you may draw the inference that he had knowledge of the contents of any tax return that he signed.

I also instruct you that, in determining whether the defendant acted knowingly, you may consider whether he deliberately closed his eyes to what otherwise would have been obvious to him. If you find that he was aware of a high probability that he owed substantially more tax than was declared on his return for a particular year and that he acted with a conscious purpose to avoid learning the truth about whether or not he owed substantially more tax than was shown on the return for a particular year, then this knowledge element in the charge may be satisfied by that. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent or foolish or mistaken. If you find that he actually believed in good faith that he did not owe substantially more tax, he may not be convicted of the crime charged in the particular count you are then considering.

It's entirely a matter for your consideration whether you find that the defendant deliberately closed his eyes to facts known to him and any inferences to be drawn from the

evidence on this issue. This issue of whether he acted knowingly and willfully has to be decided separately as to each count in the indictment.

As I said earlier, a willful act must be proved beyond a reasonable doubt. And in this context, it's defined as a voluntary and intentional violation of a known legal duty. So the government must prove beyond a reasonable doubt that he possessed the specific criminal intent to delay or evade the payment or assessment of taxes that he knew was his duty to pay.

In deciding whether the defendant acted willfully, you may consider the way he conducted affairs. If a person deliberately conducts his affairs in a way that would likely result in deception, concealment of the truth, or the evasion of taxes, it's permissible to infer that he willfully intends to evade taxes.

In this case, the government has argued that Mr. Josephberg engaged in a pattern of using entities and relatives and making false statements to the IRS in order to conceal income and assets from the collection efforts of the IRS, and that he claimed net operating losses which he knew were bogus to offset income or reduce or eliminate his tax liability. And if you find there was such a pattern, you may consider that finding, along with the rest of the evidence, in deciding whether or not the defendant willfully attempted to

evade taxes. You're not required to draw such an inference, but you may do so.

A defendant does not act willfully if he believes, in good faith, that his actions comply with the law.

If the defendant actually believed that what he was doing was in accord with the tax statutes and that he paid all the taxes he owed, he cannot be said to have had the specific criminal intent to evade taxes. Thus, if you find that Mr. Richard Josephberg, in good faith, believed that he owed no additional taxes, even if that belief was unreasonable or irrational or wrong, then you should find him not guilty. However, you may consider whether the defendant's belief was actually reasonable or actually unreasonable in deciding whether or not he held that belief in good faith.

Counts Three and Four charge the defendant, in part, with attempting to evade FICA and Medicare taxes due on wages paid to a household employee, Norma Grant.

The Federal Insurance Contributions Act, so-called FICA, imposes a tax on employers that includes two elements; old-age, survivor and disability insurance, which is commonly called Social Security, and hospital insurance, which is commonly referred to as Medicare. Social Security taxes are used to fund retirement and disability benefits, while Medicare taxes are used to provide health and medical benefits for elderly people and disabled people.

An employer is required to calculate FICA taxes based on the amount of wages that are actually or constructively paid to an employee and pay over those taxes to the IRS. An individual who employs a household employee such as a housekeeper or a maid or a nanny or some other person that works in or around the individual's private residence and pays over a specific amount of wages must pay FICA taxes and Medicare taxes on those wages. And for the years 1997 and 1998, an employer who paid a household employee wages more than $1,000 for 1997 and $1,100 for 1998 per year was required to pay such taxes on those wages.

In order for Mr. Josephberg to be obligated to pay so-called FICA and Medicare taxes on the payments made to Ms. Norma Grant, it must be established by the government beyond a reasonable doubt that Norma Grant was his employee.

An individual who provides services to another is an employee of that person if the relationship between the individual and the person for whom the services are performed is the legal relationship of employer and employee. Generally, the relationship of employer and employee exists when the person for whom the services are performed has a right to control and direct the individual who performs the services not only as to the results to be accomplished, but also as to the means and the details by which the result is accomplished. In this connection, it's not necessary that the employer actually

direct or control the manner in which the services are performed. It's sufficient if the employer has the right to do so.

The right to discharge somebody is also an important factor in indicating whether the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, include the furnishing of tools and the furnishing of a place to work. On the other hand, if an individual is subject to the controlled direction of another merely as to the result to be accomplished by the work and not the method or means of accomplishing the result, that individual is an independent contractor.

The IRS has taken the position that an individual performing domestic services in a private home is an employee of the person who directs and controls the services.

Before you may conclude beyond a reasonable doubt that Mr. Josephberg owed employment taxes for Ms. Grant for the purposes of the willfulness element of the offense of tax evasion under Section 7201 and subscribing a materially false return, Section 7206(1), which I'll come to later, you must be convinced beyond a reasonable doubt that Mr. Josephberg was aware that Norma Grant was his employee, as the law defines that term, as opposed to being an independent contractor for whom such tax payments are not required.

The defendant contends that he acted in a good-faith

belief that Norma Grant was an independent contractor. You may not conclude that he knowingly and willfully failed to pay employment taxes unless the government proves to your satisfaction beyond a reasonable doubt that he knowingly and willfully acted in violation of the law as opposed to relying on a good-faith belief that Miss Grant was an independent contractor.

The IRS has taken the position that there are 20 factors which may be considered as guides as to whether sufficient control is present to establish an employee/employer relationship. The importance of any particular factor varies depending on the context, and no one factor is controlling. And these are the 20 factors:

Instructions. A worker who is required to comply with the other person's instructions about when, where and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

Training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want services performed in a particular method or manner.

Integration. Integration of the worker's services into the business operations generally show that the worker is subject to direction and control. When the success or continuation of the business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

4. Services rendered personally. If the services must be performed personally, presumably the person or persons for whom the services are employed are interested in the methods used to accomplish the work, as well as any results.

Hiring, supervising and paying assistants. If the person or persons for whom the services are performed hire, supervise and pay assistants, that factor generally shows control over the worker on the jobs. However, if one worker hires and supervises and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

6. Continuing relationship. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer/employee relationship exists. A continuing relationship may exist where work is performed at frequently

recurring, although irregular, intervals.

7. Set hours of work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

8. Full time required. If the worker must devote substantially full time to the business of a person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.

9. Doing the work on the employer's premises. If the work is performed on the premises of the person or persons for whom the services is performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which the employer generally would require the employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route to

canvass a territory within a certain time or to work at specific places as required.

10. Order or sequence set. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows the worker is not free to follow the worker's own pattern of work, but must follow the established routines and schedule of the person or persons from whom the services are performed. Often, because of the nature and occupation, the person or persons for whom the services are performed do not set the order of services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

11. Oral or written reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

12. Payment by the hour, week or month. Payment by the hour, week or month generally points to an employer/employee relationship providing that this payment is not just a convenient way of paying a lump sum agreed upon as the cost of the job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

13. Payment of business and/or traveling expenses.

If the person or persons for whom the services are performed ordinarily pay the workers business and/or traveling expenses, the worker is generally an employee. An employer, to be able to control expenses, generally retains the right to regulate and the worker's business activities.

14. Furnishing of tools and materials. The fact that the person or persons for whom the services are performed furnish significant tools, materials and other equipment tends to show the existence of an employer/employee relationship.

15. Significant investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees, such as the maintenance of an office rented at fair value from an unrelated party, that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer/employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. Realization of profit or loss. The worker who can realize a profit or suffer a loss as a result of the worker's service in addition to the profit or loss ordinarily realized by employees is generally an independent contractor, but the worker who cannot is an employee. For example, if the

worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, therefore, does not constitute sufficient economic risk to support treatment as an independent contractor.

17. Working for more than one firm at a time. If a worker performs more than de minimus services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement

18. Making services available to the general public. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

19. Right to discharge. The right to discharge a worker is a factor indicating that the worker is an employee. The person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes

the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

20. Right to terminate. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes, without incurring liability, that factor indicates an employer/employee relationship.

That's the end of the 20 criteria.

Count Two of the indictment charges that the defendant violated Section 371 of Title 18, United States Code. That's a different statute. And here again, you don't have to know the number of the statute, but it provides in substance:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of a crime."

That concludes a reading of that statute in relevant part.

Count Two of the indictment charges that from in or about 1995 through in or about 2002, in the Southern District of New York and elsewhere, Richard Josephberg, the defendant, together with others known and unknown to the grand jury,

unlawfully, willfully and knowingly did combine, conspire, confederate and agree together to defraud the United States and an agency thereof, to wit, the Internal Revenue Service of the United States Department of the Treasury, and to commit offenses against the United States, to wit, violation of Title 26, United States Code, Section 7201 and 7206 and Title 18, United States Code, Section 1347.

It was a part and object of the conspiracy that during the period 1997 through 2002, Richard Josephberg, the defendant, and others, known and unknown, unlawfully, willfully and knowingly would and did defraud the United States and the IRS by impeding, impairing, defeating and obstructing the lawful government functions of the IRS in the ascertainment, evaluation, assessment, and collection of income taxes.

It was further a part and object of the conspiracy that during the period 1997 through 1999, Richard Josephberg, the defendant, and others, known and unknown, unlawfully, willfully and knowingly would and did attempt to evade and defeat a substantial part of the income taxes due and owing by defendant Richard Josephberg for the tax years 1994 through 1998, in violation of Title 26, United States Code, Section 7201.

It was further a part and object of the conspiracy that during the period 1997 through 1999, Richard Josephberg, the defendant, and others, known and unknown, unlawfully,

willfully, and knowingly would and did make and subscribe certain individual income tax returns, Forms 1040, for Richard Josephberg for tax years 1994 through 1998, which returns contained and were verified by written declarations that they were made under the penalty of perjury and which Richard Josephberg, the defendant, and others did not believe to be true and correct as to every material matter, in violation of Title 26, United States Code, Section 7206.

It was further a part and object of the conspiracy that during the period 1997 through 2002, Richard Josephberg, the defendant, and others, known and unknown, unlawfully, willfully and knowingly would and did execute and attempt to execute a scheme and artifice to defraud a health benefit -- healthcare benefit program, to wit, the Oxford Health Plans, OHP, and to obtain by means of false and fraudulent pretenses, representations and promises money and property owned by and under the custody and control of OHP in connection with a delivery payment for healthcare payments, items and services, in violation of Title 18, United States Code, Section 1347.

In order to find the defendant guilty of the crime of conspiracy under this particular count, the government must prove beyond a reasonable doubt the following three elements. These are different elements. These elements pertain only to this particular count.

First, that there came into existence an agreement or

understanding between two or more persons to violate the law together or to defraud the United States together;

Secondly, that the defendant knowingly and unlawfully became a member of the conspiracy; that is, that he knowingly associated himself unlawfully with and participated in the charged conspiracy with knowledge of its illegal purposes; and,

Third, that any one of the members of the conspiracy, not necessarily the defendant, but any one of the members involved, knowingly and willfully committed at least one of the overt acts charged in the indictment in furtherance of the conspiracy.

I'll explain the concept of the overt act in a moment, and I'll read you the overt acts as listed in the conspiracy charge, but first I want to speak of the three elements.

As I said earlier, a conspiracy is an agreement or combination or understanding of two or more persons, each of whom are committing the crime of conspiracy, to accomplish by concerted action a criminal or unlawful purpose. And the essence of the crime is the agreement followed by an overt act.

And so the first element which must be proved beyond a reasonable doubt is that two or more persons entered into this unlawful agreement as charged in the indictment.

You need not find that they met together and entered into any express or formal agreement, and you don't have to find that they stated in words or writing what the scheme was

or what its objects or purposes were or every precise detail of the scheme or the means by which it would be accomplished. Indeed, it would be most unusual if there were such a formal document or specific oral agreement. Common sense will tell you that when people get together to enter into a criminal conspiracy to violate the law, much is left to unexpressed understanding, and the conspirators do not usually reduce their agreements to writing or acknowledge them before a notary public, nor do they usually publicly proclaim their purpose or plans. By its very nature, a conspiracy is usually secret, and if the actions were taken in the open, the purpose behind those actions is often known only to the conspirators.

It's sufficient if the government proves beyond a reasonable doubt that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other and act together to accomplish an unlawful act as charged. And you may find that the existence of an agreement to disobey or disregard the law has been established by direct proof. Ordinarily, since conspiracy is usually secretly, you may also infer its existence from the circumstances of the case and the conduct of the parties involved. In such a situation, actions often speak louder than words. And you may infer from the totality of the evidence whether an agreement existed beyond a reasonable doubt.

In this case, the defendant is charged with conspiring

to accomplish four different illegal objectives, the first of which, it's alleged, was agreed to being accomplished was to defraud the United States and its agency, the IRS. The second alleged object is to attempt to evade a substantial amount of taxes due and owing by Mr. Josephberg for the years 1994 through 1998. The third object was to make and subscribe false personal tax returns for him for those years 1994 through 1998. And the fourth object was to execute a scheme and artifice to defraud Oxford Health Plans, which is a healthcare benefit plan.

It's not necessary for you to find that the conspiracy embodied all of these four unlawful objectives. It's sufficient if you find beyond a reasonable doubt that the conspirators agreed together, expressly or impliedly, on any one of the four illegal objectives.

If the government fails to prove that at least one of the four objectives was an object of the conspiracy in which the defendant participated, then you must find the defendant not guilty as to this particular count. However, if you find unanimously that it was the purpose of the conspiracy to accomplish any single one of the four objectives -- and you have to be unanimous on at least one of them. It wouldn't do if some felt one purpose was proved and the others disagreed, but they thought a different purpose was proved. If you're unanimous on any one of the four specific objectives, then that

particular element of the charge has been satisfied.

The second element which has to be proved is that he knowingly and willfully joined the conspiracy with a full understanding of its illegal objects.

I defined the words knowingly and willfully for you previously, and those same definitions given to you apply throughout the case.

Knowledge is a matter of inference from the proven facts. There's no way to look into a person's mind and find out what that person was thinking at some time in the past. However, you do have before you the evidence in the case from which you may, but you need not, infer knowledge, and you will piece together the proof and determine whether or not the government has proved beyond a reasonable doubt that the defendant knew of the unlawful purposes of the conspiracy and had a stake in the outcome.

The Knowledge requirement is not satisfied by demonstrating that he was merely negligent, foolish or mistaken. And mere association by one person with another does not make that person a member of the conspiracy even when coupled with knowledge that a conspiracy is taking place. Mere presence at the scene, even coupled with knowledge that the crime is taking place, is not sufficient to support a conviction. The person must know the purposes of the conspiracy, or at least one of them, and have the intention of

making it succeed.

I now come to the issue of the overt acts. The third element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that at least one of the conspirators committed at least one of the overt acts charged in the indictment in furtherance of the object or one or more of the objects of the conspiracy. There must be something more than just an agreement. It's perfectly possible for people to agree together to commit a crime and then leave each other's company and nobody does anything, in which case it was only talk, it's not a crime. It becomes a crime after an overt act -- at least one overt act is committed by at least one member of the conspiracy in furtherance of the illegal purposes of the conspiracy. The act itself does not have to be illegal.

These are the overt acts charged in the indictment:

On or about July 17th, 1997, Richard Josephberg caused to be filed with the IRS U.S. individual income tax returns, Forms 1040, for himself for the tax years 1994 through 1996, each of which tax return contained an NOL, net operating loss, of in excess of $1,500,000.

In or about September 1998, Richard Josephberg had a conversation with the accountant relating to health insurance coverage for Richard Josephberg's wife. On or about September 23, 1998, Richard Josephberg caused a false and fictitious

Schedule C to be sent to OHP via the United States Mail.

On or about October 15th, 1998, Richard Josephberg caused a false and fictitious Schedule C and a false and fictitious New York State employer tax form to be sent to OHP via Federal Express.

On or about September 30, 1999, Richard Josephberg caused to be filed with the IRS U.S. individual income tax returns, Forms 1040, for himself for the years 1997 and 1998, each of which tax return contained an NOL of in excess of $1,280,000.

That concludes a reading of the overt acts.

It's not required by the government to prove all of the overt acts alleged in the indictment. It's enough if the government proves that at least one of the overt acts was committed in furtherance of the conspiracy. However, here again, you would have to agree on at least one overt act that was committed in order for you to be unanimous as to this count.

Similarly, it's not necessary for the government to prove that each member of the conspiracy committed or participated in an overt act. It's sufficient if you find that at least one overt act was, in fact, performed by at least one conspirator, whether it was the defendant or another co-conspirator, to further the conspiracy during its existence.

The overt act may have been committed at precisely the

time alleged in the indictment, and it's sufficient if you're convinced beyond a reasonable doubt that it occurred at or about the time and place stated.

An overt act must have been done knowingly and willfully in furtherance of the object of the conspiracy, and, standing alone, it may be innocent.

Finally, you must find either that the agreement was formed or that one of the overt acts was committed in the Southern District of New York, which includes Westchester, Putnam, Dutchess, Rockland, Orange, Sullivan, New York and Bronx Counties.

With respect to Counts Five and Six, the relevant part of the indictment reads as follows:

On or about September 30th, 1999, in the Southern District of New York and elsewhere, Richard Josephberg, the defendant, unlawfully, willfully and knowingly did make and subscribe U.S. individual income tax returns, Forms 1040, for the tax years set forth below, which returns contained and were verified by the written declaration of Richard Josephberg that they were made under penalties of perjury and which returns Richard Josephberg did not believe to be true and correct as to every material matter in that Richard Josephberg, the defendant, A, claimed net operating losses in the amounts set forth below and, B, omitted household employment tax obligations whereas Richard Josephberg then and there well knew

and believed that he was not entitled to claim those losses or omit those tax obligations.

This charges a violation of Section 7206(1) of Title 26 of the Code, and that reads, in relevant part, as follows:

"Any person who willfully makes and subscribes any return, statement or other document which contains or is verified by a written declaration that it is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter shall be guilty of a crime."

That concludes a reading of the statute.

The Revenue Service, the IRS, must have truthful and complete disclosure on all tax returns in order to properly audit and compute the correct tax liability for each return that is filed. And in furtherance of this objective, this statute was passed by Congress which concerns the taxpayer's belief in the truthfulness and correctness of the statements which he or she submits on the tax return.

The section prohibits false statements and does not deal with income tax evasion. That's the statute I previously read to you.

Intent to evade taxes is not an element of the crime of filing a false tax return, and there is no requirement that the false statement resulted in any underpayment of tax. There's no requirement of any proof of tax due on these counts.

Instead, this section is designed to ensure that the government is provided by the taxpayer with accurate and complete, truthful return information.

In order to find the defendant guilty of the offense of filing a false or fraudulent tax return, which is the offense charged in Counts Five and Six, the government must prove each of the following elements beyond a reasonable doubt. If any single element of these charges is not proved beyond a reasonable doubt as to the count you're then considering, you must find a verdict of not guilty on that count. Here's the elements for the false filing counts:

First, that the defendant subscribed to them, meaning that he signed and filed the tax return;

Second, that the return contained a written declaration that it was made under penalty of perjury, printed declaration on the form;

Third, that the defendant, when he signed the return, did not believe the return to be true and correct as to every material matter; and,

Fourth, that the defendant acted willfully in doing so.

The tax return is subscribed at the time it's signed. A tax return is filed at the time it's delivered to the Internal Revenue Service. In addition, the Internal Revenue Code provides that the fact that an individual's name is signed

to a return is evidence that the return was actually signed by him.

If you conclude beyond a reasonable doubt that he signed the tax return, you may also draw the inference that he had knowledge of the contents of the return.

The second element which must be proved beyond a reasonable doubt is that the return contained a written declaration that it was made under the penalty of perjury. And to satisfy this element, the government must show that the face of the return contained a printed statement to that effect. And you must make this determination simply by looking at the return in issue. Either it's printed on the return or it's not.

The third element is that the government must prove beyond a reasonable doubt that the defendant did not believe the return to be true and correct as to every material matter. To prove this element, the government must prove that the return was materially false and that the defendant knew that it was false.

A false statement on the return must be material. This means that a statement on a line in the return is material if the information required to be reported on that line of the return is capable of influencing or impeding the IRS in verifying or auditing the return. In other words, the test of materiality in these counts is whether the information required

to be reported on the tax return in issue was important for the proper evaluation of the accuracy of the tax return.

The indictment in this case charges that the tax return listed in Counts Five and Six were false and that they improperly claimed net operating losses and they left out or omitted household employment taxes. To satisfy this element, the government must also prove that the defendant knew that the statement was false. Here again, there's two separate falsehoods claimed, and unless you're unanimous on at least one of them, you cannot convict on either of these counts.

I previously defined to you the meanings of intentionally and willfully, and those definitions apply throughout the instructions.

You may infer knowledge if you find that the defendant deliberately avoided learning whether a tax return was false as to a material matter. I also instruct you that, although the government must show the false statement made was as to a material matter -- in other words, a matter which would be important to the computation of his proper tax -- the defendant need not have known that the matter was material.

The fourth element is that he must have acted willfully. And here again, the same instructions given as to the meaning of that provision apply to all counts.

The indictment charges the defendant, in Counts Seven through Ten, with failure to timely file a tax return for the

years 1999 to 2002. The indictment reads as follows:

On or about the return due dates set forth below, in the Southern District of New York, Richard Josephberg, the defendant, unlawfully, willfully and knowingly did fail to make an income tax return for the calendar years stated below to the District Director of the Internal Revenue Service for the Internal District of Manhattan or to the Director of Internal Revenue Service Center in Holtzville, New York, or to any other proper officer of the United States, stating specifically the items of his gross income and any deductions or credits to which he was entitled, whereas Richard Josephberg, the defendant, then and there well knew and believed he had gross income in excess of a hundred thousand dollars for each such years and, by reason of such income, he was required by law, following the close of each calendar year and on or before each of the return due dates stated below, to make said income tax returns to said District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or its said proper officers.

This indictment charges a violation of Section 7203 of Title 26, and that provides, in relevant part:

"Any person required by this Title or by regulations made under the authority thereof to make a return who willfully fails to make such a return at the time or times required by law or regulations shall be guilty of a crime."

And that concludes a reading of that particular statute.

The elements for these counts that must be established beyond a reasonable doubt are that:

First, the defendant was required to file an income tax return for the tax year in issue;

Second, that the defendant failed to file an income tax return at the time due for the tax year in issue; and,

Third, that his failure to file the income tax return for the tax year you're then considering was knowing and willful, as previously defined.

The first of the elements of these counts the law requires is that a married individual filing separately who was less than 65 years old who had, during the relevant tax years 1999, 2000, 2001, and 2002, a gross income respectively of $2,750, $2,800, $2,900, or $3,000 respectively, or more, was required to make and file an income tax return regardless of whether a tax was due for that year. Therefore, in order for the government to satisfy this first element, it must establish beyond a reasonable doubt that the defendant's gross income for the referenced calendar year exceeded those particular amounts.

With respect to the second element, you're instructed that the taxpayer required by law to make an income tax return must file his tax return on or before April 15 of the year following the taxable year at issue unless he obtains an

extension to file. And in this case, the defendant obtained extensions for the years 1999 and 2000 -- through 2001, as noted below. Therefore, in order to satisfy this second element, the government must convince you beyond a reasonable doubt that he failed to file his 1999, 2000, 2001 and 2002 income tax returns on or before October 15th, 2000 for the 1999 tax year; August 15th, 2001 for the 2000 tax year; October 15th, 2002 for the 2001 tax year; and April 15th, 2003 for the 2002 tax year.

I instruct you that the fact that a defendant is under civil or criminal investigation by the IRS or some other agency does not relieve him or her of the duty to file a tax return. Neither the Constitution nor any other law excuses such a failure to file a timely income tax return. You're instructed that the statute requires the filing of a timely return, and a tax return filed months or years late does not constitute a timely filing.

The third element of willfulness has previously been instructed and applies to these counts.

A defendant does not act willfully with respect to these counts if he believes in good faith that his actions comply with the law. Therefore, if the defendant actually believed, incorrectly, that what he was doing was in accord with the tax statutes and that he was not required to file a tax return because he was under investigation, he cannot be

said to have had the specific criminal intent willfully to fail to file. Thus, if you find that he honestly believed at the time the returns were due to be filed that he was not required to file a return because he was under investigation by the IRS, even if that belief was unreasonable or irrational, you should find him not guilty of failure to file. However, you may consider whether the defendant's belief was actually held in good faith. You may consider whether his belief was reasonable as a factor in deciding whether he, in fact, held that belief in good faith.

A person is not guilty of these crimes unless he acted willfully, as previously defined.

Counts Eleven through Fifteen of the indictment charges the defendant with failure to pay tax for the years 1999 through 2003 respectively. Each year is a separate count. The indictment in this regard reads as follows:

On or about the dates set forth below, in the Southern District of New York, Richard Josephberg, the defendant, unlawfully, willfully and knowingly did fail to pay, at the time and times required by law and regulation, income tax due for the calendar years stated below in the amounts set forth below to the District Director of the Internal Revenue Service for the Internal Revenue District of Manhattan or to the Director of Internal Revenue Service Center, Holtsville, New York, or to any other proper officer of the United States,

whereas Richard Josephberg, the defendant, then and there well knew and believed he had a taxable income in excess of $100,000 for each of said years on which taxable income there was due and owing to the United States of America an income tax in the amounts set forth below, which income tax he was required to pay at the times required by law and regulation to the District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to said proper officers.

And that concludes a reading of the main part of those counts.

And these counts charge the defendant with violating Section 7203 of Title 26 of the Code, which requires as follows:

"Any person required by this title to pay any tax who willfully fails to pay such tax at the time or times required by law and regulation shall be guilty of a crime."

That concludes the reading of that statute.

The elements for this charge are:

First, that he was required to pay tax for the tax year in issue; second, that he failed to pay the tax at the time due for the tax year in issue, the particular count you're then considering; and the third element is that his failure to pay the tax due for the tax year in issue was knowing and willful; in other words, that the defendant failed to pay the

tax with the purpose of violating his duty under the tax laws and not as a result of accident, negligence or some other innocent reason.

You're instructed, as to the first element, that an individual taxpayer who is required by law to file a tax return is required, without assessment or notice or demand from the IRS, to pay the appropriate tax due to the IRS at the time fixed for filing the return.

The government does not have to prove as to this count the exact amount of the tax that the defendant was required to pay nor the exact amount as mentioned in the indictment.

With regard to Counts Eleven through Fifteen, the government contends that the amount of tax owed by Mr. Josephberg for each of those years at issue is the tax set forth on the returns themselves which he filed for those years, but did not pay.

With respect to the second element of the offense, the government must prove beyond a reasonable doubt that he failed to pay the tax due for the year in question and that he did so as charged knowingly and willfully and not by mistake or some kind of negligence or some other innocent reason. And the dates for payment are as stated before, the same as the dates for filing for those particular counts.

The third element is that he acted knowingly and willfully as previously defined for you in connection with the

other counts.

Intent to pay in the future the taxes that are due at a current time does not constitute a defense to these counts. It is not necessary that the government prove an intent to evade the payment of any taxes. The defendant's knowing intent of avoiding the legal duty that he pay constitutes the crime charged.

Financial ability is not a defense to criminal liability for willfully failing to pay the tax returns. Every citizen has an obligation to pay his income tax and is obligated to conduct his financial affairs in such a way as to have the funds available to do so.

Count Sixteen -- and we are getting near the end -- charges that he, Mr. Josephberg, between January 1996 and July 2004, knowingly, intentionally and corruptly obstructed and impeded and endeavored to obstruct and impede the due administration of the Internal Revenue laws.

This count arises under Section 7212(a) of Title 26, which reads in relevant part:

"Whoever corruptly obstructs or impedes or endeavors to obstruct or impede the due administration of this title," which is the tax title, "shall be guilty of a crime."

That concludes a reading of the statute.

The elements of this count are, first, that the defendant in any way corruptly endeavored to obstruct or impede

the due administration of the Internal Revenue Code. That's to be regarded as three separate elements. That he endeavored, that he obstructed or attempted to obstruct.

Corruptly means to act with the intent of securing an unlawful advantage or benefit either for one's self or another.

The term endeavored, as used in these instructions, means knowingly and deliberately to act or make an effort which has a reasonable tendency to bring about the desired result.

It's not necessary to prove that the endeavor was successful or achieved the desired result. And factual impossibility in succeeding is not a defense. Even if the government failed to prove that there was an underlying tax obligation during that period of time, the defendant can still be found guilty of corruptly endeavoring to obstruct the due administration of the Internal Revenue Act if the defendant believed that there was such an underlying tax obligation and corruptly endeavored to impede and impair the IRS efforts to try to collect that liability.

To obstruct or impede is to hinder or prevent from progress, check, stop or also retard the progress or make the accomplishment difficult and slow.

The due administration of the Internal Revenue laws include the IRS efforts to collect, assess and determine the tax liabilities of individuals and companies. I, therefore, instruct you that the tax liabilities at issue need not be

those of the defendant alone.

Now I turn to the last charge, which is Count Seventeen of the indictment, and that charges the violation by Mr. Josephberg of Title 18, United States Code, Section 1347, the Federal Healthcare Fraud statute. And that statute provides, in relevant part:

"Whoever knowingly and willfully executes or attempts to execute a scheme or artifice to defraud any healthcare benefit program or to obtain by means of false or fraudulent pretenses, representations or promises any of the money or property owned by or under the custody or control of any healthcare benefit program in connection with the delivery of or payment for healthcare benefits, items or services shall be guilty of a crime."

That concludes a reading of that statute.

In this count, the defendant is charged with engaging in a scheme or artifice to defraud Oxford Health Plan and a scheme to obtain funds from that program by false and fraudulent pretenses; that is to say falsely representing that his wife was a salaried employee of J.G. & Company in order to obtain healthcare insurance under a business healthcare plan.

The count reads as follows:

"Between on or about 1997 and 2002, in the Southern District of New York and elsewhere, Richard Josephberg, the defendant, unlawfully, willfully and knowingly did execute and

attempt to execute a scheme and artifice to defraud a healthcare benefit program, to wit, Oxford Health Plans, and to obtain by means of false and fraudulent pretenses, representations and promises money and property owned by and under the custody and control of OHP in connection with the delivery of payment for healthcare benefits, items and services, to wit, Richard Josephberg falsely represented to OHP that his wife was an employee of J.G. & Company in order to obtain health insurance coverage under a business healthcare plan offered by OHP.

Although the indictment charges the defendant with a scheme or artifice to defraud and a scheme or artifice for attempting to obtain money by means of false or fraudulent pretenses, representations and promises, the government must prove beyond a reasonable doubt that the defendant did at least one of these. It doesn't have to prove both, so long as you are unanimous as to which of the purposes, either the scheme or artifice to defraud the healthcare benefit program or to obtain money from the program. But you would have to be unanimous on at least one of them in order to convict.

In order to sustain a charge of healthcare fraud, the government must prove the following elements beyond a reasonable doubt:

First, that at or about the time alleged in the indictment, there was either a scheme or artifice to defraud

the program or to obtain money by false and fraudulent pretenses, representations or promises from the custody of the program;

Second, that the defendant knowingly and willfully devised or participated in the scheme or artifice to obtain money and property based on fraudulent and false pretenses, representations, or promises with knowledge of the fraudulent nature and with specific intent to defraud; and,

Third, that the scheme was conducted in connection with the delivery of or payment for healthcare benefits, items or services.

I instruct you as a matter of law that private healthcare insurers like Oxford are healthcare benefit programs within the meaning of that statute which was just read to you a minute ago in connection with Count Seventeen.

The government has the burden to establish the existence of a scheme or artifice to defraud.

A scheme or artifice is simply a plan for the accomplishment of an object.

Fraud is a general term which embraces all ingenuous efforts and means that individuals devise to take advantage of others. The advantage sought must involve money, property or other things of value.

A scheme or to defraud is merely a plan to obtain something of value by trick, deceit, deception or falsehood.

You may find the existence of such a scheme if you find that the defendant conducted himself in a manner which departed from traditional concepts of fundamental honesty and fair play in the general business life of society.

Apart from proving a scheme or artifice to defraud, the government can satisfy the first element of the healthcare fraud statute alternatively by proving the existence of a scheme or artifice to obtain money or property by means of false or fraudulent pretenses, representations or promises.

The definition of the word scheme is the same as in the other half of the charge.

Fraudulent is a general term which includes all possible means by which a person seeks to obtain some unfair advantage over another person by intentional misrepresentations, false suggestions or concealment of the truth. That unfair advantage must involve money, property or other things of value, such as health insurance coverage or benefits.

A pretense, representation or statement or document is fraudulent if it was made falsely and with intent to deceive.

A representation, statement, claim or document may also be fraudulent if it contains half truths or if it conceals a material fact in a manner which makes what is said or represented deliberately misleading or deceptive.

Deceptive need not be premised on the spoken or

written words alone. The arrangement of the words or the circumstances in which they're used may convey the false and deceptive appearance.

It's not necessary for the government to establish that any particular person actually relied on or suffered any damages as a consequence of the fraudulent representation or concealment of the facts, nor need you find that the defendant profited from the fraud. It's enough if you find that the false statement or a statement omitting material facts made what was said deliberately misleading and was made as part of a fraudulent scheme in the expectation that it would be relied on.

You must concentrate on whether there was such a scheme, not the consequences of the scheme. Proof concerning the accomplishment of the goals of the scheme may be persuasive evidence of the existence of a scheme.

In addition, the falsehood or fraudulent representation or failure to disclose must relate to a material fact or matter.

As I defined earlier, a material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement or failure to disclose in making a decision. This means if you find a particular statement was false or it concealed facts that made what was said deliberately

misleading, you must then determine whether that statement was one that a reasonable person operating a health benefit plan would have considered important in making his or her decision.

The government is not required to establish the scheme actually succeeded or that anyone actually realized any gain from it or that anyone suffered a loss. The question for you to decide is did the defendant knowingly devise or participate in a scheme to defraud a healthcare provider or a scheme to obtain money or property from a healthcare provider by false or fraudulent pretenses, representations or promises. The scheme need not be shown by direct evidence, but may be established by all the evidence in the case. And, here, the government alleges that the scheme was based on submitting documents to the health insurance company.

Specifically, the indictment alleges that the documents submitted to Oxford Health Plans falsely depicted Arlene Josephberg as a full-time salaried employee of Josephberg, Grosz & Company, working more than 20 hours per week. And it is alleged that this conduct was intended to deceive Oxford into providing health insurance coverage for the employees of that firm under a group policy that would have been unavailable to Josephberg, Grosz & Company if Oxford had known the full truth about Arlene Josephberg's status and the actual number of full-time or salaried employees that Josephberg, Grosz had during the relevant period. And it is

alleged that this was accomplished by submitting a Schedule C to a tax return and New York State form prepared by Fox which it is alleged the defendant knew to be false and fraudulent as to a material matter.

Here again, it must be shown that the defendant's participation was knowing and willful, as previously defined.

The words devised and participated don't need any definition. Devise a scheme is to plan it or invent it or figure it out. And to participate means to associate one's self with a scheme with an intent of making it succeed.

It's not necessary to show the defendant originated the scheme. The defendant acts with intent to defraud if he engages or participates in a scheme to obtain money by false and fraudulent pretenses, representations or promises with knowledge of the scheme's fraudulent or deceptive character and with the intent to be involved in it and help it succeed.

The government need not prove the intended victim was actually harmed or that the Oxford lost any money as a result.

If you determine that the defendant committed a fraud, it's no defense that he was or believed he was entitled to the benefits that were sought through the fraudulent scheme. The government need only establish that the defendant participated in a deceptive scheme intended to deprive an insurance company of material information or to obtain money by false and fraudulent pretenses and, thus, keep the insurance company from

determining for itself whether it was appropriate to provide coverage for Josephberg, Grosz & Company at a certain premium. And it's no defense that he might have been entitled to coverage at or a different rate if he had sought coverage through truthful representations.

The third element that must be shown is that it was in connection with healthcare benefits. If the scheme involved insurance coverage for healthcare services, that element will be satisfied.

As I think I indicated to you earlier, the fact that the indictment alleges certain acts occurred on or about specific dates doesn't matter if the evidence shows that the particular act occurred on a different date if there is a substantial similarity between the alleged date and the actual date. And the same is true with respect to dollar amounts mentioned in the indictment. The law only requires a substantial similarity between the indictment and the proof. If a different amount was determined, if it's not material, it's not significant.

There's no obligation on the government to call any witnesses whom you would regard as cumulative to those who already testified. And you should not draw any inference or any conclusions as to what an uncalled witness would have testified had that witness been called because, although a defendant doesn't have to prove his innocence, both the

government and the defendant have the right to subpoena witnesses. So uncalled witnesses should not be an issue. You decide the case on the evidence that's before you, or the lack of evidence, and don't speculate as to what some other person who might have been called would have said.

I want to make it clear that each of these counts involves the issue of whether the defendant acted intentionally and willfully.

Specifically, with respect to whether the household employee was an independent contractor or an employee, if the evidence shows that the defendant acted in a good-faith belief that she was, in fact, an independent contractor and that he treated her as such, he would not be found to have acted knowingly and willfully on the issue. Whether he, in fact, held such a good-faith belief is an issue to be determined by you, and you can consider all the evidence in the case as bearing on that. And if you find that such a belief was unreasonable, that may be a matter for your consideration in determining whether the belief was actually held. But if he was acting in good faith, even if the belief was irrational or unreasonable, he would not be acting knowingly and willfully and, therefore, could not be convicted of that particular item.

Now, I guess it goes without saying that it's your duty to try and decide this case fairly and impartially. And each of you, that means each of you, during your deliberations

is entitled to your own views and opinions. That's what deliberation is all about. Listen to the other jurors and give your own opinions and speak with each other open-mindedly and politely, in a friendly fashion, but listen to one another, reason it out, and discuss the evidence and take your time.

The verdict, when you reach it, represents the decision of each juror for himself or herself, and if any one of you has a point of view which doesn't agree with the rest, you're not to give it up simply because you're outnumbered or out-talked by the other jurors. The verdict must be unanimous, but nobody has to give up his or her opinion to make it so.

If, after discussion, on the other hand, you find that the views of the other jurors appeal to you as being more likely to be correct than your own opinion -- in other words, if they really convince you -- you shouldn't hesitate to change your mind and agree with the others if you do, in fact, agree.

But the verdict has to be unanimous as to each count. Each of you is to apply your conscientious efforts to deliberate with each other to reach a unanimous decision, but there's no compromising, there's no shortcut. The jury verdict, once reached, represents the decision and verdict of everybody on the jury.

You will have in the jury room all of the exhibits which have been received in evidence in the case. And you will also have in the jury room with you a copy of the indictment,

which, as I said earlier, is not evidence. It's merely a designation of what the charge is. You will also be provided with a sheet of paper, which is a document -- you can refer to it as a ballot. It's a listing of the charges by number to assist you in setting forth your verdict when reached.

We also will be sending in a tape recorder of the jury instructions which I've been giving this morning and a machine to play it. Whether you use that or not is solely for your own benefit and it's up to you.

If you find there's something unclear about the Court's legal instructions as to any particular count, send out a note and ask to have it explained further. And I'll consult with the attorneys about the note, and, after doing that, I'll invite you out here to open court again and attempt, to the best of my ability, to answer the note if you have any problem with the legal instructions.

Similarly, you're entitled, under the law, to have evidence, testimony, read back to you by the court reporter. That's a lengthy process, so please don't request readbacks without specifying clearly what you want read and without first discussing it among each other, because the collective memory of 12 people is better than that of any one or two jurors. But after discussion, if you want a read-back, that's your absolute right, and just send out as clear a note as you can, and I'll bring everybody together, and the court reporter will read to

you whatever portions of the trial testimony you may want to have read.

The jury should select a foreperson. You can do that by majority vote. That's the only decision you can really make by majority vote, except what time you want to start tomorrow, and that could be done by majority vote. All other things have to be unanimous.

The function of the foreperson is simply to preside over the deliberations of the jury, sort of like a chairperson, so that everybody doesn't talk at once, and to announce the verdict when reached. But his or her opinion as to how the case should be decided has no greater validity than any other juror.

When you select a jury foreperson, he or she should take that first chair. That chair is reserved for the foreperson. The rest of you could all move over.

When the jury's reached a verdict, you will tell the security officer who will be outside your door that the jury has reached a verdict or you can send out a note saying the jury has reached a verdict and we'll convene everybody together. The clerk will ask the foreperson whether the jury has reached a verdict. If he or she says yes, we have, then the clerk will go down through each count and ask the foreperson how the jury finds. The foreperson can use the ballot to read from. And after the verdict has been announced,

the clerk will ask each juror separately whether the verdict as announced is the verdict, the unanimous verdict, of the jury.

The verdict on each count will be either not guilty or guilty.

At this point, I'm going to ask you to remain seated where you are and I'm going to speak with the attorneys, because it's possible that they might want me to give some additional information. It's even possible they might want me to correct a mistake I might have made. So please just stay there and keep an open mind for just a couple of minutes more.

(At the sidebar)

THE COURT: Does the government have anything?

MR. OKULA: Just one brief thing, your Honor.

Your Honor had indicated during the charge conference -- and I'm at page 2054 of the transcript -- that you would charge that a few thousand dollars of evaded tax may, in a particular case, be considered substantial. You indicated that.

THE COURT: I thought I said that.

MR. SCHARF: I thought so, too.

THE COURT: I don't think I said a few thousand. I think I said it was up to them.

MR. OKULA: Right. But I think, during the jury charge, you said that you would give that. And that had been given in the sample charges of Judge McMahon and Judge Preska

that we had.

THE COURT: All right. Either write it out or get it for me.

Anything else?

MR. OKULA: That's it, your Honor.

THE COURT: All right, sir.

MR. SCHARF: Your Honor, we have quite few, and I would request that we be given an opportunity to confer among us to get our list together and that the jury be excused so we can say it more easily out loud rather than whispering here.

THE COURT: Well, you're entitled to do that if that's what you want. I can't assure you that that's a good idea or not.

MR. SCHARF: Well, I would appreciate it nevertheless.

(In open court; jury present)

THE COURT: There are several matters which the attorneys wish to discuss. It's going to take little bit of time. And, accordingly, I would like all of you take a recess because there might be some additional things which have to be discussed to make my instructions complete. And since you haven't heard them all yet, I want you to continue to keep an open mind. So please, all of you, including Mr. Vasquez, the alternate, please go in there. And don't discuss the case.

If you want to elect your foreperson, you can do that. However, Mr. Vasquez, you can't vote on it. Okay?

THE DEPUTY CLERK: I will get the lunch order.

THE COURT: Yes, get the lunch order. That's a good idea.

(In open court; jury not present)

THE COURT: All right, anyone not actually speaking can be seated.

Are you ready to go?

MR. SCHARF: Yes, your Honor.

Your Honor, first, we have several exceptions, or objections, and several requests for further instructions. Just for the record, let me state the ones first that are for further reference.

We respectfully request instructions concerning depreciation, as we submitted previously in writing. All of these were submitted previously in writing.

We request an instruction regarding TEFRA, also submitted April 2nd.

We request an instruction on -- although there was ample instructions concerning the burden of proof, which we appreciate, we request the converse instruction on the burden of proof in civil cases, as that was an issue. That came into the evidence here since the government is relying on tax court judgments, where the burden of proof is different.

We also requested in writing, and we renew that request at this time, for an instruction on the definition of

quick assessments or the lack of a definition thereof.

In addition, we requested on April 2nd, and renew at this time, a request for an instruction on the statute of limitations for assessments of additional taxes, the three-year statute of limitations, which is the general rule.

We also requested, and renew our request at this time, an instruction concerning consents to extend the period of limitations for assessing additional taxes.

We also request -- and this has special meaning because your Honor gave the government version, but -- concerning no obligation to call certain witnesses if they're cumulative. But in view of the cumulative instruction, which is correct in law, we request the additional missing witness instruction pertaining to situations where one party has unique control over a person. And, of course, I'm referring specifically to Revenue agents. And at the same time, we're requesting a missing evidence instruction, based on Arizona v. Youngblood, regarding the fact that some evidence was shipped off to the Brookhaven Service Center or to other places. We request a standard instruction that we've submitted in writing regarding inferences that may be drawn from both missing witnesses uniquely under the control of one party and from missing evidence that is uniquely under the control of one party.

So that's the renewal of our written requests of April

2nd.

In addition, based on what we've heard already, I don't know how substantial this first one is, but there was several times when the Court read the year incorrectly. Maybe the jury could be instructed that if the year was read incorrectly, such as I believe, in one instance, your Honor said 1990 to 1985 or something like that.

THE COURT: I certainly don't recall doing that.

MR. SCHARF: Well, at one point your Honor I believe said 1988 when you meant to say 1980. I don't think it's a big deal, but the jury should be instructed that if it's obvious that the year was read incorrectly, they should consider the year in the indictment.

The first substantial request we have, or objection, is the instruction regarding anticipatory assignments of income. While that does accurately state the law, we believe that the Court should add the defendant's theory, which is that it's not income if it has no value. Similarly for assets. We agree that anticipatory assignments of income are not valid under tax law, but they must pertain to what is actually income, and income is something inherently valuable. So if the jury finds that there's no value, there's no violation of the assignment of income principle.

Number two regarding the instructions concerning employee versus independent contractor, we do appreciate that

the Court read the 20 factors; however, we would request, respectfully, that the Court add to that that there's no weighted average and there's no guidance on how to weigh those factors.

THE COURT: That's in there. That was actually read.

MR. SCHARF: Okay. Then I apologize.

Also, we request that the statutory nonemployee instruction be read to the jury, since there is evidence under IRS publications that a statutory employee -- a statutory nonemployee, I should have said, is someone who takes care of children or elderly or infirmed people. We believe that there is evidence that that applies to Ms. Grant's care for Jessica in 1997 and 1998 and it fits within the Publication 15(a), as described during the evidence. Or even, if the Court will not instruct the jury that that is the law, at least we would request that the Court instruct the jury that the defendant is entitled to rely on that reasonably as part of the willfulness requirement.

Next, regarding the failure to file instructions concerning the willfulness element, I believe your Honor instructed the jury that it may consider whether his belief was reasonable. Reasonableness implies --

THE COURT: I think I said whether he believed it in good faith.

MR. SCHARF: Okay. That, to me -- I could be wrong on

this one, but my recollection of the U.S. Supreme Court decision in United States v. Cheek is that there is no requirement of objective reasonableness.

THE COURT: I agree with that, but I don't think I told them that.

MR. SCHARF: Okay. If good-faith reasonableness does not imply objectivity, then we have no objection.

THE COURT: What the proper instruction was intended to be is if he had good faith, he was acting in good faith, he couldn't be found to be acting willfully. However, in determining whether he acted in good faith, the reasonableness of his beliefs can be considered as evidence bearing on whether he really did subjectively have good faith. I'm sure that's the thrust of the instruction given. That was the intention, anyway.

MR. SCHARF: I don't recall your Honor having said subjective good faith.

THE COURT: I did not because I felt that would be confusing, but I think that's what it gets to.

MR. SCHARF: I don't know that -- I could be wrong, but it's my belief that good faith, reasonable good faith, is inconsistent with subjective good faith, and we would request that the subjective good faith --

THE COURT: The jury may find, if it's unreasonable, that it was not, in fact, held in good faith, because they

can't look into his head and see what he was thinking, but they can infer his intentions and knowledge from all of the evidence. So if someone has -- I don't mean to be facetious, but if someone has the opinion that Allah told him not to file, if he really believed that, he can't be convicted. On the other hand, they can consider the unreasonableness of it in determining whether he really believed it.

MR. SCHARF: Well, in any event, we would just request that the instruction be reread including the words subjectively reasonable good faith, which would include the word of Allah or Bhuda or whomever.

THE COURT: Have you concluded?

MR. SCHARF: On that.

THE COURT: Why don't you finish and I'll hear the government.

MR. SCHARF: Thank you.

Regarding the presumptions that attend to the transcripts of account, or I believe your Honor called them the assessments, we don't believe that the defense theory of the case was articulated. The government's theory was. Your Honor read the proposed instructions last Thursday, I believe, and used the words that the assessments may be considered prima facie evidence. Today I don't think it came out as may be. That's two words, not one. I think it came out as the assessments are prima facie evidence as opposed to may be.

THE COURT: What the Court said was that you are instructed that assessments by the IRS constitute prima facie or sufficient evidence of the asserted tax deficiency. You may, however, consider whether there is evidence from which it can be concluded that the IRS improperly or incorrectly assessed the taxes in determining whether he owed additional taxes. You must consider all the evidence in the case and decide whether the government has proved beyond a reasonable doubt if Mr. Josephberg owed substantial additional income tax for the tax year you're considering. The government doesn't have to prove the precise amount owed so long as it is substantial for a count in the indictment you are then considering.

I really think that that's a correct statement and what we discussed at the charge conference.

MR. SCHARF: Well, our only problem with that is the one word, constitute. As read, the assessments constitute prima facie evidence, whereas we had believed from Thursday, and we believe it's a correct statement of the law, that the assessments may be prima facie evidence, may constitute.

THE COURT: Well, all right. I understand your position.

MR. SCHARF: In addition, on the healthcare fraud, we have several.

Before I get to that, I left out that we had requested

in writing an instruction on valuation pertaining to restricted securities. We would renew that request at this time.

THE COURT: That I believe I declined because that I believed to be set forth in the Code of Regulations. It may be a dumb regulation, but I think that's what they said.

MR. SCHARF: Well, if your Honor is referring to Internal Revenue Code Section 83 --

THE COURT: I'm referring to this nonsense that a restriction that expires sometime in the future is not to be considered in reaching a value for tax purposes. And I think that they can do that.

MR. SCHARF: Well, that's valuation for purposes of determining a tax. That's not true economic valuation, which is the issue here. And we believe that Section 83 definition is totally inapplicable to the facts here, where we're discussing economic value. If it had no economic value, then it's not an income item or an asset regardless of how the Internal Revenue Code requires that it be reported for tax purposes. So we request that valuation instruction that we submitted in writing on April 2nd. I think it was April 2nd. That's when it's dated. Maybe we submitted it a few days later.

THE COURT: Whatever day it was. I don't think I agreed to read that.

Are you finished?

MR. SCHARF: No, your Honor. I have more regarding the healthcare fraud count.

Your Honor stated -- when paraphrasing the Count Seventeen, your Honor paraphrased that the count charges that Richard Josephberg falsely represented that his wife was a salaried employee. The count does not charge that he falsely represented she was a salaried employee. It only charges that he falsely represented that she was an employee. We would request that that be reread without the word salaried and that the jury be told that salaried is not part of the charge.

THE COURT: If that's not part of the charge, then that count ought to be dismissed.

MR. SCHARF: Well, that was our Rule 29 argument.

In addition, your Honor charged the jury correctly as to both legs or both alternative positions concerning a conviction for healthcare fraud, but not that they both intersect and that the jury must require, under either leg of the count, that Richard Josephberg falsely represented that his wife is an employee.

THE COURT: I think that's clear. I think that's clear from the substance of the instruction.

MR. SCHARF: Okay. Well, then I withdraw that one.

Next, your Honor stated that, in defining money or property, your Honor said such as healthcare coverage, and I don't believe that that's consistent with the law or perhaps

there is no law on that issue, that healthcare coverage could be considered property such as --

THE COURT: It certainly shows an action, doesn't it? If they don't pay it, you can sue. That's property. It shows an action is property.

MR. SCHARF: Okay. Then I'll move on, but we would make that request, nevertheless.

THE COURT: Well, I'll decline that. I think that's kind of borderline foolish. I don't say that disrespectfully. I appreciate your advocacy.

MR. SCHARF: I know that, your Honor. Thank you.

The indictment did not say or did not charge that Arlene Josephberg is required to be a full-time salaried employee.

THE COURT: Twenty hours. Oh, the indictment didn't charge it?

MR. SCHARF: The indictment didn't charge that she was full-time. Neither did it charge that she was salaried. But then, later, your Honor used the words full-time, salaried employee. I don't think that's part of Count Seventeen. Not that I don't think. It isn't, in fact.

Your Honor's words, I believe, were that she's a full-time, salaried employee working more than 20 hours a week. The 20 hours is not in the count, the full-time is not in the count, and the salaried is not in the count. The count

requires that Richard Josephberg falsely represented that she's an employee. That's all it charges.

Also, we believe that that charge concerning Count Seventeen assumed that there was an untruthful statement and thereby presented the government's theory of the charge, or the count, but it did not present the defense theory, which was that there's no basis to prove that Arlene Josephberg did not, in fact, work for Richard Josephberg.

THE COURT: The question was whether she received the twelve grand.

MR. SCHARF: Well, that's not in the count.

THE COURT: I heard you.

MR. SCHARF: Thank you.

May I have a moment to confer with co-counsel if I left anything else out?

THE COURT: Yes.

(Counsel conferred)

MR. SCHARF: In addition to what I said previously about the 20 hours, I believe the Court stated in the charge conference last week -- no, not in the charge conference, but during the testimony that the 20 hours is not an issue, and now, in this version of the charge, the 20 hours was made an issue.

THE COURT: Well, I think the whole representation is really what's involved in the count, and it has to be treated

as a whole to determine whether it's false. Of course she worked for the business. I don't doubt that. We heard testimony from Oxford that, to be covered, she had to be paid and that she had to do 20 hours average.

MR. SCHARF: I believe the Oxford witness, Mr. Sinclair, said she did not have to be paid. She has to work the 20 hours, but he did not say she has to be paid.

THE COURT: I may be wrong, but my memory is otherwise. I thought that the essence of the fraud really was the money, which Fox and the defendant damn well knew they didn't have her on Schedule C.

MR. SCHARF: Well, that --

THE COURT: Let me hear the government's response to that when you have covered everything.

MR. OKULA: Just with respect to that, your Honor --

THE COURT: Wait, wait, wait. Wait until he's finished.

MR. OKULA: Oh, I'm sorry.

MR. SCHARF: I believe I'm finished, subject to conferring with co-counsel.

THE COURT: Please go confer with co-counsel.

(Counsel conferred)

MR. SCHARF: Finally, your Honor, we believe that the constant repetition to the jury of the requirement that there must be unanimity implies that they must come to a verdict as

to each count, whereas, in reality, if they're not unanimous, they do not have to return a verdict. I think that should be explained as well.

Thank you, your Honor. That's everything.

MR. OKULA: May I, your Honor?

THE COURT: Yes. Just give me a moment to organize my notes.

MR. OKULA: Okay. I'm sorry.

(Pause)

THE COURT: Go ahead, Mr. Okula.

MR. OKULA: Thank you, your Honor.

Going in reverse order, with respect to the healthcare fraud statute, the indictment, specifically in Count Seventeen, incorporates the allegations of paragraphs 31 to 33, and in paragraph 32, it specifically alleges that Richard Josephberg caused to be sent to Oxford Health Plans a Schedule C together with a New York State Employer Tax Form which falsely and fraudulently reflected that Richard Josephberg's wife was a wage earning employee of Josephberg, Grosz & Company.

So your Honor was right that the essence of our proof and our theory with respect to Oxford health is that he sent that false schedule that falsely reflected she was making income. And Mr. Sinclair said at the very end of his testimony that he equated the requirement, the employee requirement, to somebody being a wage-2 earner of salary as a requirement.

So that's the essence of our theory. And based on that, I think the Court's charge is balanced and fair and need not be changed.

THE COURT: You're suggesting that the allegations in Seventeen can be deemed amplified by the allegations in Count Two. Is that what you're saying?

MR. OKULA: Yes. Exactly right, yes, your Honor.

THE COURT: So there's no issue of notice.

MR. OKULA: That's correct, because they incorporate by reference in the specific allegations in Seventeen those paragraphs in Count Two.

With respect to the assessment definition, I think the Court's charge is consistent with Silkman and it's clear. And the law is clear that the assessments are valid proof of the deficiency. And then it goes on, as your Honor instructed, to say that the Court -- I mean the jury can consider whether it's been undercut or successfully attacked in some fashion. So we don't think that needs any clarification.

With respect to the companion sitter issue, your Honor, there's no issue of companion sitter here. The companion sitter issue relates to the relationship between the person who --

THE COURT: Well, I think that was aired fully to the jury. And I think that the charge fairly presents the defense that he had a good-faith belief that she was an independent

contractor, which, if it were so, he would have filed a 1099. But that doesn't matter. That only goes to the facts. However, I really want to be sure that we're clear on that. I don't think the word subjective has to be used. But I'm waiting to hear what you think.

MR. OKULA: Well, I think your Honor conveyed what Cheek requires; that is that your Honor perfectly, correctly instructed that good faith is an absolute defense, consistent with Cheek, but, in the jury's assessment of whether the defense was held -- or the belief was held in good faith, they can consider the reasonableness of the position in determining whether the good faith was held in -- really in good faith or whether it was a valid assertion of good faith by the defendant.

So, based on that, on your Honor's I think very clear and correct instruction, I don't think there's any further amplification needed. I think, indeed, it's consistent with what the Pattern charges require on that.

With respect to the other requests that Mr. Scharf is requesting, I don't think that there's any need or amplification with respect to missing evidence or missing witness or certainly not quick assessments or TEFRA or the burden in civil cases. Your Honor adequately instructed them. This is a criminal case, and we have to prove our burden beyond a reasonable doubt. There is no issue that's really in play

with respect to depreciation. The defense asked a couple of questions about depreciation, but there's no specific alignment between any depreciation from any entity and how that affects Richard Josephberg's tax liabilities or tax deficiencies for the years in question.

We do agree, your Honor, though, that some statute of limitations charge should be fashioned and should incorporate, I think, a reference to the fact that there were consents of the statute that were assigned.

So, beyond that, we have no other comments.

THE COURT: You're not concerned over the missing witness?

MR. OKULA: No. I don't think that that should be given at all, your Honor. I don't think that there is anybody that is uniquely within the control of the government that they couldn't have subpoenaed themselves and brought here. A missing witness is really with respect to somebody who is uniquely within the control of one party. They haven't identified who they're talking about here.

THE COURT: Well, they're subject to subpoena, too. If they're IRS agents, they're subject to subpoena.

MR. OKULA: That's correct. And that's exactly my point.

THE COURT: Well, I think anything much more I could do might inject confusion.

I think I'm going to take a brief recess and allow you to write, Mr. Okula, and to share with Mr. Scharf the additional instruction as to statute of limitations. I'm seriously considering whether I should read Section 83 of the Code, but I don't know that that would add much.

MR. SCHARF: We're not requesting 83, your Honor.

MR. OKULA: And we don't think that that's necessary, either.

THE COURT: I didn't quite understand the depreciation issue.

MR. SCHARF: Excuse me, your Honor?

THE COURT: Depreciation.

MR. SCHARF: We are requesting depreciation, yes.

THE COURT: What do you mean by that?

MR. SCHARF: I'm referring to the issue that arose during the trial that because -- since the opening statement by the government that because Mr. Josephberg earned this much income and he only paid such few taxes, there must be something wrong. Mr. Dennehy acknowledged in his testimony that this could be perfectly legal if, in fact, the deductions are correct. One of the deductions we suggested through several witnesses, including Mr. Dennehy, was the deduction for depreciation.

THE COURT: Of what?

MR. SCHARF: Of partner assets, real estate or other

assets.

THE COURT: As far as I understood it, the partnerships which caused the problem were partnerships which were either straddles or repos, and government securities which are the subject of repos do not depreciate. And insofar as concerns the straddles, they don't depreciate, either.

I am really at a loss to see anything relevant in the issue of depreciation. I think I'll leave the record as it is on that.

But I will give the statute of limitations instruction. The government has offered to write it out in handwriting. As clearly as you can. Share it with your adversary. See if you can agree as to form without the defense waiving any rights of that exception to the charge. And we'll resume in about five minutes.

MR. OKULA: Great, your Honor.

MR. SCHARF: Your Honor, as to the missing witness, though, we strenuously disagree that these witnesses are within our control and we could have subpoenaed them. We don't have the means to find these Revenue agents. We don't know where they are. We don't know if they still work for the IRS.

THE COURT: You can have an exception on that. I think the charge as presently standing is a fair one. I think it makes clear that he's presumed innocent. He doesn't have to call any witnesses. And he has the right to subpoena people.

And they ought to decide the case on the facts, on the evidence or lack of evidence. And it's a red herring, frankly.

MR. SCHARF: May I make two other points concerning Mr. Okula's statements regarding Count Seventeen?

THE COURT: Yes, certainly.

MR. SCHARF: Although paragraph 32 does refer to the salary, it's not the charging language. It's just the story of the count. But the charging language does not refer to the salary or the full-time employment.

THE COURT: I understand that. And it may be argued -- and it may be a borderline issue, but it may be argued that the totality of the indictment is enough to give notice to the defendant that the salary is the real hocus-pocus of this thing.

I don't think you can question that she was an employee. Of course she did. She said she did. And there's no reason to disbelieve her. But she sure didn't collect $12,000 out of the business for what she did. And the Schedule C was never filed in the tax return, as was impliedly represented, as a copy of something that had been filed. Never was. And she never was paid. And, indeed, the company or the business certificate or whatever it was that Josephberg, Grosz never took a deduction for her salary, the whole thing is phony. But if it were not for the salary issue, there's no case on Seventeen.

MR. SCHARF: Well, but Mr. Sinclair specifically testified Oxford does not care if she gets paid. That was his testimony. So how could it be part of the fraud if Oxford doesn't care?

THE COURT: Did he really say that?

MR. SCHARF: The five of us believe that based on our notes. We didn't --

MR. OKULA: I would like to grab his testimony, your Honor, because I think he said at the very end of his testimony that he equated the concept of employee -- when he was asked -- remember the policy said you don't consider 1099 employees independent contractors when you count who is an employee, who isn't an employee. Implicit in that is the notion that you have W-2 employees. And I asked him the question did you consider the definition of employee somebody who's a W-2 employee, and he said yes.

THE COURT: Well, you wouldn't have a W-2 unless you get paid a salary.

MR. OKULA: Exactly right.

MR. SCHARF: Which he doesn't care about. He said they don't care.

THE COURT: Well, one of you is wrong. Maybe my recollection is wrong.

Please come back in 10 minutes. And try to tend to those things in the meantime. The longer we keep the jury

waiting, the less desirable it is.

(Recess)

(In open court; jury not present)

THE COURT: The lunch is about to arrive, so I don't want to let this matter remain hanging too long. So can I get your input on this request, and then we'll go.

MR. OKULA: Yes, your Honor.

We have fashioned a request which I think, in a very succinct manner, addresses the issue of the statute of limitations. It includes the real issue, I think, that the request gets at, which is what the three-year period is and then the applicability of any consents or waivers. So I think that that covers it.

MR. SCHARF: Our position, your Honor, is that the government's instruction accurately states the law as far as it goes, but it does not go as far as required by the facts of this case, and that our proposed instruction on page 19 that we submitted a week or two ago accurately states the law as applied to the facts of this case, because there could also be an expiration of the statute of limitations after the tax court decision, and the government's only addresses the three years as it runs before the notices of deficiency are issued. We would, however, concede that the first two lines of our request should be deleted as they pertain --

THE COURT: But don't I understand correctly that you

protested quite vigorously the fact that the tax court judgment was a default judgment? And in my discussion with the jury, I did not mention the tax court judgment. I mentioned only the assessments.

MR. SCHARF: Well, I'm not requesting that the tax court judgment be -- well, I am --

THE COURT: I think I'll use this -- I think I'll take out the word even. It can be indefinitely. Don't have to characterize it as even indefinitely.

MR. SCHARF: Thank you, your Honor.

THE DEPUTY CLERK: Court Exhibit number 7, your Honor.

THE COURT: Court Exhibit 7 marked for identification.

MR. OKULA: Your Honor, on just one final point with respect to the issue of Mr. Sinclair's testimony. There was some dispute about what he said. I'm reading from page 1150 of the transcript. This is posed by myself to Mr. Sinclair on redirect.

"Q. Do you consider employee, in defining eligible employees, as someone who is a W-2 as opposed to a 1099 employee?"

And after an objection was overruled, he answered yes.

THE COURT: W-2 implies salary.

MR. SCHARF: Your Honor, it implies salary, of course, but it's not responsive to our request. Mr. Sinclair did testify on cross-examination, toward the very end, that Oxford does not care if the person is salaried.

THE COURT: Would you look and see where that is.

MR. SCHARF: We don't have that volume here.

THE COURT: I understand, but I believe the government does.

I think I ought to proceed without waiting further. And I think I'll adhere to that ruling.

Please bring in the jury.

MR. SCHARF: Could we borrow the Court's copy of the transcript?

Thank you.

THE DEPUTY CLERK: Bring in the jury, your Honor?

THE COURT: Yes.

(In open court; jury present)

THE COURT: There are a couple of extra things I want to discuss.

I failed to instruct you in connection with my legal instructions with respect to the statute of limitations. And you're now instructed, in addition to the other matters mentioned earlier by me, that the tax law provides that taxes must be assessed by the IRS within three years of the date of the filing of the taxpayer's tax return or the due date of the tax return, whichever is later. And a taxpayer may waive the three-year requirement, however, and may agree to extend the period within which the IRS may assess his or her taxes. The period of extension, or waiver, may be for a particular time

period or indefinitely.

That's an additional instruction with respect to the statute of limitations which you will consider, which you should consider.

I'm also told by the attorneys that I -- in my attempt to read the matter fast enough and get finished, that I misspoke a couple of times with respect to the years; that I gave the wrong year date inadvertently. I don't recall doing that, but it certainly wasn't intentional. But you're instructed that the dates in the indictment are the dates that control, and if I stated a different year in any of my instructions, you're to go by what's in the indictment, not by the year that I may have mentioned.

The next thing is I am certain that I did tell you that a verdict on the count had to be unanimous and that nobody should give up his or her principles or views simply to make it so. I did not expressly tell you that you don't have to come to a verdict on a particular count if you're not unanimous.

That ought to be obvious, but in case it's not, you can't agree unless you do, in fact, agree. And no one is to change his or her views unless you're convinced by the rest of the jurors that they're more likely to be right than you are. And there's no obligation to be unanimous if you're not unanimous. So if you can't decide a particular count after full and fair discussion among each other, then you go on to

the next count and consider it.

There are a couple of other small matters.

As you know, you can't smoke in the building. If anyone has to take a break, to take a smoking break, to go downstairs or outside or the smoking room in the jury section, the rest of you should stop deliberating until that juror returns, because every juror has to be fully participating at all times in the deliberations of the jury. So if anyone is unavailable, stop.

When you come to the point of wanting to quit for the day, which ought to be around 5:00, but that's really up to you -- we can't stay much after 5 for various reasons. But when you're ready to quit for the day, send out a note saying so. And put in the note what time you would like to start tomorrow, because you don't need anybody but yourselves to start. The clerk will come in and take attendance at that time in the morning. And if a few of you get there early, don't discuss the case until everybody is present and participating, because, here again, every juror has to participate at all times, and no one should be discussing it unless everybody is present.

You can now return to enjoy your lunch and commence your deliberations. We'll be sending in the exhibits and the other materials.

And Mr. Vasquez, our alternate juror, would you just

step down here and let the rest of the jurors go in the jury room.

Swear the marshal.

(Marshal sworn)

THE DEPUTY CLERK: Please state your name for the record.

THE MARSHAL: John Freiler, F-R-E-I-L-E-R.

THE DEPUTY CLERK: Thank you.

THE COURT: Thank you, sir.

MR. OKULA: Your Honor, may we be heard just briefly at sidebar?

THE COURT: On the record?

MR. OKULA: Yes, your Honor.

(Discussion at the sidebar)

MR. OKULA: I believe Mr. Murphy was writing out the additional instruction, with respect to the tax deficiency element, that two or three thousand dollars may be insufficient. I think he's just locating that.

(In open court; jury present)

THE COURT: Just be patient. There is one more point.

You're instructed that, as to the requirement in connection with the tax evasion counts that the tax deficiency be "substantial," substantiality of the deficiency is for you to decide based on all the evidence and circumstances in the case relating to the particular count. A few thousand dollars

of evaded tax may, in a given case, be considered substantial, depending on all those circumstances, but it's for you to decide whether an amount involved in a particular count for a particular year is or is not substantial within the context of this statute.

Anything further? Can I now start?

MR. OKULA: They may start, your Honor.

THE COURT: May they start?

MR. SCHARF: They may, your Honor.

THE COURT: Thank you both.

Okay. Please enjoy your lunch.

(Deliberations commenced at 12:25 p.m.)

(In open court; jury not present)

THE COURT: Everybody please give attention for a moment because I want to talk to Mr. Vasquez. Please take your seats and pay attention.

Sir, I want to thank you for your service as an alternate juror.

I want you to know that, once the jury deliberations begin, the number is reduced to 12. Do you understand?

THE ALTERNATE JUROR: I understand, sir.

THE COURT: And you perform a very important function by being here in case anyone should get sick or anyone should fail to complete their service as jurors.

It's a possibility that there might come a time when

one of the remaining jurors wouldn't be able to finish, and if that happens, I'm going to ask you to make yourself available to go in and undertake the deliberations with the jury and ask the jury to start their discussions all over again if that happens. I have no reason to think it will happen.

I'm going to ask you, therefore, not to express any opinions as to how it ought to be decided between now and the end of the case. And don't discuss the case with anybody. And don't speak to any of the participants.

As I understand, we have your phone number. And if we need you to come back and take a hand in the deliberations, we're going to give you a call.

THE ALTERNATE JUROR: Yes, sir.

THE COURT: We don't know when that would be.

Please don't talk to any of the other jurors or telephone them or have anything to do with them until you know for sure the case is over. And that might not even be this week. So would you be willing to do that for us?

THE ALTERNATE JUROR: I will, your Honor.

THE COURT: All right.

Anything else that any of you want me to take up with Mr. Vasquez before he's excused?

MR. OKULA: No, your Honor.

MR. SCHARF: None on behalf of the defense, your Honor. Thank you.

MR. OKULA: No, thank you.

THE COURT: Thanks again.

I believe the clerk has your lunch. And we're going to want you to enjoy it in a separate location because they're supposed to be deliberating.

THE ALTERNATE JUROR: Okay.

THE COURT: Thank you very much. The clerk will take you to a place where you can have lunch, and then we'll call you if we need you.

THE ALTERNATE JUROR: Okay.

THE COURT: You can take it with you if you want.

THE ALTERNATE JUROR: Whatever you like. That's fine.

THE COURT: Thanks so much.

(The alternate juror left the courtroom)

THE COURT: As far as I'm concerned, you can all go to lunch. I will be having a meeting with the judges outside the building commencing at 1:00 for probably 45 minutes, but I would like you to be around in case a note does come from the jurors.

You've already seen on the record what the exhibits are that she's taking in, have you?

MR. SCHARF: Yes, your Honor.

MR. OKULA: Yes, your Honor.

THE COURT: Okay. Thank you.

(Recess pending verdict)

(In open court; jury not present)

THE COURT: We're just going to break for the day. Are you prepared to do that, or do you want to wait for Mr. Sullivan?

MR. SCHARF: He will be in in a moment, your Honor. If we can wait, I would appreciate it.

THE COURT: The question they wanted to ask was what they were to do with the exhibits, and she told them they will be locked in the jury room. She's given them sealed envelopes to put their own scratch books in and seal them up.

THE DEPUTY CLERK: Did you want to tell them what the questions were?

What they should do with all those exhibits. They were going to keep them in the carts and put them on the side. I don't think the cleaning man, Mr. Bernard, who is the cleaning man all the time, will go into the exhibits. The notes I had them put in sealed envelopes. And the food goes to security. That was their questions.

They'll be back tomorrow morning.

MR. SCHARF: Are we deliberating Friday? Are they deliberating Friday?

THE DEPUTY CLERK: Well, we won't know that until tomorrow.

THE COURT: Bring in the jury, please.

(In open court; jury present)

THE COURT: Members of the jury, we have Court Exhibit 8, which is your note. It says, "We are ready to adjourn. We would like to start at 9 a.m. on Thursday, 4-19-07."

That's fine. And as soon as I finish speaking, you can recess for the day. And you come in at 9:00 tomorrow. And do not start deliberating until everybody is present.

In the meantime, between now and then, don't discuss the case with anyone who is not on the jury, and don't read anything about it in the media or television, radio, anything like that. Don't speak to any of the parties or be present when anybody is discussing the case.

The note also said, "Alice, please come in. We have questions." Unless the questions are entirely trivial, like what time will the coffee come, if it's any serious, substantive question, you ought to put it in writing for the Court.

I understand from the deputy that she has given you, at your request, envelopes to seal up your personal scratch notes and has made arrangements to lock the exhibits in the jury room.

If there's any other open question, I would like you to please tell me.

THE FOREPERSON: No, there aren't, your Honor.

THE COURT: Nothing else? All right.

Well, thank you very much. And you're excused until

9:00 tomorrow morning. Please come on time. You don't need to wait on anybody else once you're all there. Thank you very much.

MR. SCHARF: Your Honor, before the jury leaves, your Honor, may I approach the sidebar to ask a question about scheduling on Friday?

THE COURT: You want the court reporter?

MR. SCHARF: Well, no. It's not substantive. It's just about scheduling.

THE COURT: Please stand by. Please be seated.

(Discussion at the sidebar, off the record)

(In open court; jury present)

THE COURT: Thanks. You can go for the night. We'll see you tomorrow.

(At 4:55 p.m., the jury left the courtroom)

(Adjourned to Thursday, April 19, 2007, at 9:00 a.m.)